

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 2000 Session

STATE OF TENNESSEE v. RITA DAVIS

**Direct Appeal from the Circuit Court for Marshall County
No. 13808 Charles Lee, Judge**

No. M1999-01281-CCA-R3-CD - Filed September 22, 2000

OPINION CONCURRING IN RESULTS

Although I agree with the result reached by the Court in this case, I cannot agree with the suggestion in the principal opinion that it may be appropriate in some felony cases involving cocaine to apply the mitigating factor that: "The defendant's criminal conduct neither caused nor threatened serious bodily injury." Tenn. Code Ann. § 40-35-113(1). The majority supports this suggestion with three unpublished cases of this Court which concededly seem to hold that application of this mitigating factor may be appropriate in felony cases involving cocaine where the amount of the drug is relatively small and the defendant's conduct did not threaten severe harm in any other way. *See, State v. Michael Wayne Henry*, No. 02C01-9611-CC-00382, 1997 WL 283735 (Tenn. Crim. App. at Jackson, May 29, 1997); *State v. Johnny Ray Christman*, No. 01C01-9211-CC-00361, 1993 WL 335420 (Tenn. Crim. App. at Nashville, September 2, 1993); *State v. Clyde Davis*, No. 32, 1991 WL 4468 (Tenn. Crim. App. at Jackson, Jan. 23, 1991).

These three cases however stand in stark contrast to a large and venerable body of law developed by this Court in both published and unpublished opinions which hold that mitigating factor number one is simply not applicable to felony cases involving cocaine. *See, State v. Vanderford*, 980 S.W.2d 390, 407 (Tenn. Crim. App. 1998); *State v. Keel*, 882 S.W.2d 410, 422 (Tenn. Crim. App. 1994), perm. app. denied (Tenn. 1994); *State v. Larry Wayne Burney*, No. M1999-00628-CCA-R3-CD, 2000 WL 374759 (Tenn. Crim. App. at Nashville, April 7, 2000); *State v. Cornelius Starks*, No. M1999-00340-CCA-R3-CD, 2000 WL 424294 (Tenn. Crim. App. at Nashville, April 20, 2000); *State v. Jeffrey A. Burns*, No. M1999-00873-CCA-R3-CD, 2000 WL 711148 (Tenn. Crim. App. at Nashville, June 2, 2000); *State v. Chris Smith*, No. 03C01-9807-CR-00259, 1999 WL 619042 (Tenn. Crim. App. at Knoxville, August 17, 1999); *State v. Kenyetta Fields*, No. 03C01-9805-CR-00178, 1999 WL 826021 (Tenn. Crim. App. at Knoxville, October 18, 1999); *State v. Michael Anthony Pike*, No. 02C01-9509-CC-00261, 1997 WL 13740 (Tenn. Crim. App. at Jackson, January 16, 1997); *State v. Kenny Cheatham*, No. 01C01-9506-CC-00196, 1996 WL 310405 (Tenn. Crim. App. at Nashville, June 11, 1996); *State v. Larry D. Jones*, No. 01C01-9112-CR-00368, 1992 WL 146719 (Tenn. Crim. App. at Nashville, June 30, 1992).

This body of law is evidently premised on the notion that the inherently dangerous nature of cocaine makes application of this mitigator inappropriate in felony cases involving that drug.¹ I believe these latter cases chart the better course with respect to the issue of whether mitigating factor (1) is applicable to felony cases involving cocaine. Therefore, I would not apply mitigating factor (1) in the case sub judice. For these reasons I concur in the result reached by the Court.

JERRY L. SMITH, JUDGE

¹In State v. Keel, supra., this Court found that the legislature's classification of cocaine in the drug control act and the lengthy sentences for felony offenses involving this drug sufficiently take into account the drug's inherent potential for damage to the human body so as to make improper, in felony cocaine prosecutions, the application of enhancement factor (10): "The defendant had no hesitation about committing a crime when the risk to human life was high . . ." Tenn. Code Ann. § 40-35-114(10). Id. at p. 420. However, this Court went on to hold that, conversely the application of the mitigating factor involved in this case was improper. Id. at p. 421. Apparently the inherently dangerous nature of cocaine cancels out application of either enhancement factor (10) or mitigating factor (1) in felony prosecutions for this drug.